United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals, District of Columbia.

JANUARY TERM, 1909.

616

No. 1974.

JOSEPH VAN FLEET, APPELLANT,

vs.

ABE KING, APPELLEE.

APPELLANT'S BRIEF.

ROBT. E. MATTINGLY,
JOHN C. GITTINGS,
J. M. CHAMBERLIN,
Attorneys for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

JANUARY TERM, 1909.

No. 1974.

JOSEPH VAN FLEET, APPELLANT,

vs.

ABE KING, APPELLEE.

APPELLEE'S BRIEF.

Statement of Case.

Joseph Van Fleet, the appellant, filed a bill in equity against the appellee, Abe King, praying the dissolution of a partnership existing between them and for an accounting of the proceeds of the sale of their bar-room business at 1216 Pennsylvania avenue northwest.

The cause was heard on bill and answer and the appeal is from the decree passed therein October 23, 1908 (R., 11).

The articles of agreement, entered into December 20, 1907 (R., 4), provide that the appellee should furnish the necessary amount of money to obtain the lease, licenses, stock in trade, and other necessary equipment, required to establish the business. In compliance therewith Van Fleet made certain promissory notes, known as first-trust notes, in

the sum of $4,650, payable to the order of King on demand, bearing interest at 6 per cent., and secured by a deed of trust on the entire equipment of the business (R., 6). For further security of King, Van Fleet made another promissory note, known as a second-trust note, for $7,000, payable on demand to King, or order, with interest at 6 per cent., and secured by a deed of trust on the said equipment of the said business (R., 7). The business was conducted satisfactorily until about May 18, 1908, when King, with the consent of Van Fleet, negotiated a sale thereof to one Moses Dade for $7,500. The terms of the sale, incorporated in the agreement (R., 9 and 10), provide for a payment of $1,500 in cash and certain promissory notes, namely, one for $500, to be endorsed by one Benjamin Heide, payable three months after date, and one for $500, payable in one month, and 50 notes in the sum of $100 each, secured by a first trust upon the equipment of said business, payable monthly, commencing two months from date, all of the notes bearing interest at 6 per cent. At the same time the appellee, King, with the consent of Van Fleet, arranged with the holders of Van Fleet's first-trust notes to substitute therefor notes to be made by Dade under said agreement. These agreements were fully carried out by all the parties, and on June 2, 1908, which is the same day upon which he received Dade's notes and trust securing them, the business was released to Dade, as grantee of Van Fleet, from the operation of the deed of trust theretofore given by Van Fleet, and all the notes of Van Fleet were marked paid and canceled and returned to appellant by King, and the release was duly recorded.

The said articles have a particular provision in reference to the disposition of the assets in case of a failure or sale of the business, which is in the following language, viz:

> "In case of failure of said business or sale of said equipment before the payment of said first-trust notes, the amount remaining unpaid of said first-trust notes and all unpaid debts incurred in the management of said business shall be borne and paid equally

> by Van Fleet and King, *and any surplus thereafter remaining shall be equally divided between them* * * *" (R., 5).

As appellant's prayers for dissolution of the partnership and an accounting were granted, and the amount he claimed to be due was not disputed, the only controversy is over the mode of accounting, and the appeal is directed to that portion of the decree.

The record shows that after having paid the firm's debts there was left $1,440.87. This was made up of the two $500 unsecured notes, four of the $100 notes secured by deed of trust, and $40.87 in cash (R., 7-8). The other secured notes of Dade were accepted by the holder of Van Fleet's notes, and appellant's notes were returned marked canceled and paid. Of this surplus it was contended appellant was entitled to one-half, namely, one of the $500 unsecured notes and two of the secured notes and one-half of the cash, less the amount King had paid him. The decree provides that appellant is to receive seven of the secured notes maturing 38, 40, 42, 44, 46, 48, and 51 months after the date of June 2, 1908.

Assignment of Error.

So much of the decree of the court below is erroneous as provides

> "That the defendant endorse without recourse to him and thereupon deliver to the said complainant, * * * the seven promissory notes of Moses H. Dade, dated June 2, 1908, and maturing respectively 38, 40, 42, 44, 46, 48 and 51 months after date, etc."

ARGUMENT.

It is difficult for us to perceive upon what just ground, equitable, or legal, King can retain the available surplus of the sale and leave Van Fleet to wait at least three years before his share of the proceeds of the business he helped to build up, the entire capital of which he supplied, can be of use to him. Laying aside the equities of the situation, we submit that appellant is entitled to an equal distribution of the surplus by virtue of the same paragraph of the agreement under which the appellee claims the right to hold it.

The fact that King became endorser and guarantor for Dade cannot effect the situation of Van Fleet. There is not the slightest suggestion that Van Fleet agreed to become an endorser of Dade's notes, or guarantor of Dade's rent. Even King does not claim such to be the case in his answer. It is recited in the second paragraph of King's answer that the main purpose of the agreement between Van Fleet and himself was to protect him as a creditor (R., 6).

It is perfectly patent that when King substituted Dade's notes in the place of Van Fleet's he had identically the same security. Consequently there was in King's hands for distribution, under the terms of the agreement, two unsecured notes for $500 each, four of the secured notes and $40.80 in cash, and it is inconceivable to us how the court below could decree that Van Fleet should receive notes which had been substituted in the place and stead of those given by Van Fleet.

We respectfully submit that the facts in this case surrounding the substitution constitute a complete novation.

29 Cyc., 1130, defines novation as:

> "The substitution by mutual agreement of one debtor, or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new

debt or obligation for an existing one, which is thereby extinguished.

"It is a mode of extinguishing one obligation by another—the substitution, not of a new paper, or note, but of a new obligation in lieu of an old one—the effect of which is to pay, dissolve, or otherwise discharge it."

The definition given in the Am. & Eng. Enc. of Law, vol. 21, second edition, 662, of the simplest form of novation is that of the substitution of a new debtor, taken from Pothier, and is as follows:

"Novation is the substitution of one obligation for another, and takes place either by the substitution of a new for an old party or by the substitution of a new agreement between the old parties, or it may be, by a change both of parties and of agreement at the same time.

"The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties, the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt" (20 Cyc., 1136).

In every novation there are four essential requisites:

1. A previous valid obligation.
2. The agreement of all the parties to the new contract.
3. The extinguishment of the old contract.
4. The validity of the new one.

A novation is a new contractual relation.

20 Cyc., 1130.

21 Am. & Eng. Enc. Law, 2d ed., 663.

If these requisites be applied to the case at bar the facts will be found to be well within them; a complete novation has taken place and Van Fleet's notes cannot be considered,

or dealt with otherwise than as paid. As there is no question that the holder of Van Fleet's first trust notes consented to the substitution of Dade's notes in their stead (R., 7), it would be unnecessary to consider him. He is, however, not a party here or concerned in the transaction at this time.

At the time negotiations for the sale were entered into Van Fleet was owing King $4,792.50, being the first trust notes of $4,650 and $142.50 interest thereon (R., 7). As the sale progressed we find Van Fleet owing that amount to King and Dade owing Van Fleet. As a result of the sale to Dade, we find King released Van Fleet from his obligation by a deed of release duly recorded (R., 7), marked the notes he held representing the same paid and canceled, and delivered them to Van Fleet and in lieu thereof accepted Dade's notes secured by the same property that formerly secured those of Van Fleet.

Appellee earnestly contends that he did not agree to discharge appellant from the latter's obligation when Dade was accepted as creditor in his stead. Such contention can hardly have great weight in the face of his own acts. How could such result possibly be obtained without the express, much less implied, consent of appellee?

Is he not now estopped to deny that he consented to release Van Fleet and accept Dade as a debtor in his place, when he executed a solemn deed of release and therein pronounced that Van Fleet's agreements have been fully performed and all and singular the purposes of said trust have been accomplished? Then, again, we find his signature to the memorandum of sale in which he gave his express consent to the transfer (R., 9).

Where there is no doubt as to the terms of the agreement it is a question of law for the court whether a novation has been effected (Trudeau *vs.* Poutre, 165 Mass., 81).

Even though these instances of express consent were not admitted or did not appear in the case, the many other cir-

cumstances would justify the court in finding that a novation had been effected.

> "Occasional statements are found in the cases to the effect that the assent of parties to a novation must be express, or that there must be an express agreement. Such statements are either inadvertently made, or are due to the influence of the civil law. The rule is stated in other cases to be that the assent or promise may be either express or implied and this must be regarded as the correct rule" (21 Amer. & Eng. Enc., 669).

Does appellee seriously contend that he could yet proceed against appellant if Dade should fail to pay and the security prove inadequate? If he cannot it is only upon the theory that Van Fleet has paid his indebtedness and is no longer liable. That being the case, it is not clear how he can rightfully withhold appellant's property.

The acceptance by King of the notes of Dade and his release of Van Fleet's debt abrogated that clause in the agreement, which provides for the payment of Van Fleet's notes, and he could not retain the profits.

Page on Contracts, 1340.
Gross *vs.* Sweet, 188 Ill., 555.

The notes being delivered immediately and the trust securing them discharged, the novation would be complete (Hyde *vs.* Booream, 16 Pet., 169).

It is not required that there shall be an express agreement for a novation or substitution of parties to a contract. It may be implied.

Jones *vs.* Austin, 26 Ind. App., 399.
De Witt *vs.* Monjo, 46 App. Div., N. Y., 533.
Lane *vs.* Oil Cloth Co., 103 App. Div., N. Y., 378.
Hard *vs.* Burton, 62 Vt., 358.
Warren *vs.* Batchelder, 15 N. H., 129.
Mercer *vs.* Miles, 28 Neb., 211.
Grich *vs.* Comstock, 99 Mich., 520.

Novation is not presumed, but if the surrounding circumstances clearly indicate that the intention of the parties was to novate a debt it will be so held (Meyer *vs.* Atkins, 29 La. Ann., 586).

A debt once extinguished by novation cannot be again revived, unless by the consent of the parties to the original contract (Cox *vs.* Williams, 7 Mart. N. S. (La.), 301).

On the point of delivery of the note and security, the Virginia court in Fidelity Ins. Co. *vs.* Railroad, 86 Va., 1, said:

> "There is certainly no better settled principle in equity, nor one, perhaps, which has more often been recognized and acted upon by this court, that no mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or a vendor's lien will operate to discharge the debt, unless so intended by the parties. At the same time, it is equally well settled that where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged. In a case, therefore, of a change of securities, the question always is, what was the intention of the parties? As it is usually expressed, the question whether the transaction amounts to a novation is a question of intention, to be derived from all the circumstances of the case, although nothing positive be expressed. And in the absence of proof of a special agreement, the giving up or the retention of the original security will, in general, be a decisive circumstance in determining that question; for if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor without fortifying himself with some acknowledgement of the real nature of the transaction."

Mailhouse *vs.* Frazier, 25 Md., 96, is a case closely in point. There Frazier sold real property to Mailhouse, receiving one-seventh of the purchase money in cash and his notes payable in 1, 2, and 3 years for the balance. Mailhouse sold and conveyed to Michaelis all his interest in the property, and a deed was made by the three parties, in which Frazier agreed

to accept the surrender of Mailhouse notes to him and accept Michaelis notes in lieu. The court held that Frazier by surrendering the notes of Mailhouse surrendered the debt for which they stood, and that the acceptance of the Michaelis notes was a substitution.

Assuming the relationship existing between appellant and appellee to be a partnership, "a contingent one," if it pleases appellee, it is admitted that they stood as debtor and creditor at the time of the sale (appellee's answer, R., 6), and certainly do not now so stand. If he had intended to preserve his recourse to Van Fleet, in the event of Dade's failure to meet the notes, King could easily have done so by having Van Fleet endorse them.

In fact, every expression of the appellee, and his every act, as well as the surrounding circumstances, indicate, as we think, beyond question that he entertained no other intention than to release all claims against appellant, and to accept Dade in his place. This fact is further manifested by his payment of $50 to Van Fleet on account of the surplus, and offering him $100 alternate months, maturing as early as February, 1909 (R., 8).

It is safe to assume that appellee was not magnanimous in making that offer, and his assertion now that he still looks to appellant as his debtor, and that Dade's notes were merely accepted as collateral security, carries with it conviction that it is an afterthought which he hopes may now prove profitable.

Viewed from all standpoints of law and equity, the appellant is entitled to an equal distribution of the surplus forthwith, and the cause should be remanded and a decree passed accordingly.

Respectfully submitted,

ROBT. E. MATTINGLY,
JOHN C. GITTINGS,
J. M. CHAMBERLIN,
Attorneys for Appellant.